

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RIO TINTO PLC,

Plaintiff,

v.

14 Civ. 3042 (RMB)

VALE, S.A., et al.,

Conference

Defendants.

New York, N.Y.
January 13, 2015
2:00 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

QUINN EMANUEL URQUHART & SULLIVAN LLP

Attorneys for Plaintiff

BY: ERIC C. LYTTLE

MICHAEL J. LYLE

CLEARY GOTTlieb STEEN & HAMILTON LLP

Attorneys for Defendant Vale, S.A.

BY: LEWIS J. LIMAN

JONATHAN I. BLACKMAN

SCOTT B. REENTS

MATTHEW KARLAN

MISHCON DE REYA LLP

Attorneys for Defendant BSG Resources Limited

BY: VINCENT FILARDO

ELIZABETH ROTENBERG-SCHWARTZ

KAVITHA SIVASHANKER

SULLIVAN & WORCESTER LLP

Attorneys for Defendant Mahmoud Thiam

BY: PAUL E. SUMMIT

MARTIN J. AUERBACH

Attorney for BSG Resources defendants

(Case called)

THE COURT: I have your status letter. With respect to the proposed discovery schedule, I am going to grant what you have asked for, meaning fact discovery cutoff December 31 of this year, expert completion by March 31 of next year. Judge Berman, when he sees you in a few days or a week, may cut that back. The one thing I will tell you is that by not suggesting we cut it back a few months, consider that as having gotten all your extra extensions built in, meaning it will take somewhat of a catastrophe or exceptional circumstance, not I suggested to them X and they took a week to get back to me with Y and. It's time to get moving completely.

As to the trigger dates for other things, expert disclosures, etc., I will approve what you have done here. Why don't you folks put it into a form of order that I can sign and submit it to me. I guess, Mr. Lyle, that would be for you guys as the plaintiff.

MR. LYLE: Will do, your Honor.

THE COURT: When we talk about certain of the briefing schedules, about defendant Thiam, if I'm not mispronouncing it too badly, I'm not sure why we have to wait until the end of February for that. But we will get to it in order.

That takes care of item I(B).

As to I(A), I suggest you deal with all of that when you see Judge Berman, as to the briefing schedule and the

1 briefs. I suspect Judge Berman is not going to be thrilled by
2 60 pages, but I'm going to let him make that decision. You
3 might decide to ask for less than that in the hope that then
4 you will get it as opposed to being left with 25.

5 Have you made further progress, now on Roman numeral
6 II, on the predictive coding issue?

7 MR. LYLE: Your Honor, we have received a position
8 from Vale. There really are two issues with the coding issue.
9 Number one is, is Vale committed to doing it? I think this has
10 overarching impact as we discuss discovery and scope of
11 discovery throughout today. We have asked them several times,
12 but they have not been able to affirmatively answer or say no,
13 they are not going to do it. We would like that answer.

14 Secondly, the only real debate on the proposal that is
15 on the table is whether we are going to be doing issue coding
16 or simple binary responsive/nonresponsive when it comes to seed
17 sets and testing.

18 THE COURT: All right. Mr. Liman.

19 MR. LIMAN: Your Honor, Scott Reents of my firm has
20 been integrally involved in case and discovery on this issue.

21 MR. REENTS: Your Honor, I want to note for the
22 record, my application for admission to the Court is pending.

23 THE COURT: For full admission or pro hac?

24 MR. REENTS: For full admission.

25 THE COURT: How long has it been pending?

1 MR. REENTS: I'll be sworn in next Tuesday.

2 THE COURT: Perfect. Welcome board.

3 MR. REENTS: On predictive coding, we have been
4 engaged in discussions with plaintiffs and we have resolved a
5 lot of the issues. We have a pretty good protocol. With
6 respect to the two questions raised by counsel, I think it is
7 premature for us to decide whether we are committed to it. I
8 think it is sort of artificial. We haven't decide whether we
9 are committed to it.

10 THE COURT: When are you going to decide that? If you
11 mean are you committed to it, you are going to try it, and if
12 it fails, you will do something else, that is one thing. If
13 you are not going to try it at all, it seems to me that is a
14 decision that needs to be made sooner rather than later or the
15 schedule is going to wind up blown apart. And it is not going
16 to be blown apart.

17 MR. REENTS: It is not an all-or-nothing decision from
18 our perspective. There are a couple of discrete issues where
19 we think predictive coding may not be an appropriate
20 methodology.

21 THE COURT: That's fine. Are you prepared to use it
22 for everything else? If not, when could you make that
23 decision?

24 MR. REENTS: I would say that it is likely we will be
25 using it for many of the issues at stake. We haven't made a

1 firm decision on that. I would expect we would be able to make
2 one shortly.

3 THE COURT: How shortly is shortly?

4 MR. REENTS: Within the next two or three weeks, I
5 would imagine.

6 THE COURT: So, in two or three weeks you are going to
7 decide whether you are going to use it, when you are going to
8 use it, and produce the documents. Quite frankly, and I think
9 we have a date for the document production in the proposed
10 schedule here, it is time to move.

11 MR. REENTS: That's right, your Honor. The dates
12 contemplated in the schedule are substantial completion by the
13 end of June for document production and rolling production is
14 after that. We have started document review. We anticipate
15 making rolling production.

16 THE COURT: I may have asked this before and my memory
17 is not perfect. Who is their vendor?

18 MR. LYTTLE: Our vendor is Equivio, your Honor.

19 MR. REENTS: We are using Deloitte.

20 THE COURT: Have you had your respective vendors get
21 together?

22 MR. LYTTLE: We have. We have had a phonecall, your
23 Honor, with the vendors on the phone to hash out the logistics
24 and details of the protocol.

25 MR. REENTS: For the record, our vendor was not on

1 that call. I was on that call. But we can involve the vendors
2 when we need to.

3 THE COURT: The sooner you all make sure that the
4 people talking about this know what they are talking about,
5 with no disrespect to counsel, the more likely it is that you
6 will make a good decision and an even better implementation.
7 Do you think it useful to have an expert in the field of
8 predictive coding to be a special master/assister? It may not
9 be somebody who will make the decisions for you subject to
10 review by me, subject to review by Judge Berman, but somebody
11 who can help you narrow whatever gaps remain.

12 MR. LYTTLE: From the plaintiff's perspective, your
13 Honor, we do believe a special master would assist in this. We
14 have provided some suggestions to defendants and have asked for
15 their response. If they have any initial suggestions, would
16 they like to be on initial reachout calls where there are
17 conflicts? We were told they want to discuss it with their
18 client, and we haven't heard back from them.

19 MR. LIMAN: Your Honor, we have now discussed it with
20 our clients. From Vale's perspective, we are prepared to
21 consider the option of a master. We think it is premature at
22 this point to appoint one, but what we would like to do is
23 spend the next couple of weeks interviewing people. If we
24 don't make progress, then I think at the next conference we
25 would be prepared to present something.

1 THE COURT: Let me put it to you this way. I am loath
2 to order special masters because I recognize it costs the
3 parties money, and I am free to you. On the other hand, every
4 time we have one of these conferences, we are dealing with
5 innumerable issues, and instead of the more typical monthly
6 half-hour conference, it is the two-, three-hour conference.
7 You have used up your allotment of court time. You are now in
8 overtime. If things don't start going more smoothly, you are
9 not going to have a choice.

10 If I were to appoint a general discovery special
11 master with full special master powers, that might be different
12 than somebody who is a frequent co-speaker with me on
13 predictive coding, a technology assistant, and maybe available,
14 might be conflicted, or might not have any desire to do this,
15 or whoever else you have all come up with, merely to help on
16 the predictive coding side of things.

17 For example, what method of TAR are you contemplating,
18 are either of you contemplating: Continuous active learning,
19 simple active learning, simple passive learning, etc., all of
20 which result in different work flows?

21 MR. LIMAN: Your Honor, I think we have come close to
22 an agreement. Frankly, if we are not able to in the next
23 couple of days, I think we should have a special master with
24 respect to the predictive coding.

25 THE COURT: All right.

1 MR. LIMAN: We do think, agree, that discovery in this
2 case may have been made unduly complicated. We have with
3 respect to the request made of Vale a proposal that Mr. Reents
4 is going to put in front of you. Mr. Blackman is here with
5 respect to the requests we have made of Rio Tinto, which have
6 not been complied with.

7 THE COURT: I think it is time to keep your feet to
8 the fire. By a week from Friday you are going to make a
9 decision on the Vale side as to whether you are using
10 predictive coding for anything or not and have further
11 discussions between and amongst the parties as to the method to
12 be used, etc. Hopefully, that will result in a cost-free
13 resolution and you don't need a special master limited to the
14 TAR field. But we have really got to move.

15 I think there was a second question plaintiff raised.

16 MR. LYTTLE: The other issue was issue coding for seed
17 sets. My proposal, strictly out of efficiency, would simply be
18 to set the code documents, inspect the test sets, responsive or
19 nonresponsive, and not get an issue coding where the parties
20 will only argue further about how it should be coded for what
21 issue and what issue not to. It is simply an efficiency thing.
22 We are still talking about that with them, but that is our
23 position.

24 MR. REENTS: I don't know that we are at impasse on
25 this issue, at least as far as I was aware. Our concern is

1 just transparency. You can train the computer software either
2 with a binary decision, responsive/not responsive, or you can
3 train it using multiple issues. Our proposal is just that if
4 they are training it using multiple issues, that they disclose
5 what those issues are to us so we have some visibility on how
6 they are training it.

7 THE COURT: Sounds like you all need to talk about it
8 further, since I heard an "if" in that. If both sides are
9 using comparable methodology, if it is only a yes-or-no coding,
10 relevant/nonrelevant, sounds like you are in agreement on that.
11 It's just if they are doing it some other way, Mr. Reents, you
12 want to know that and want input into it.

13 MR. REENTS: That's right.

14 MR. LYTTLE: That's accurate, your Honor. We are
15 planning binary, responsive/nonresponsive.

16 THE COURT: Sound like you have agreement on that.

17 MR. REENTS: We weren't aware of that. But if that's
18 what they are doing, that's fine.

19 THE DEFENDANT: OK. Item IV. On Thiam, whoever is
20 the movant, why do you need until February 20th to make the
21 motion? My general principle, as set forth in my chambers
22 rules, is opposition two weeks, reply one week. This seems to
23 be taking a three-week and ten-day approach. But I'm most
24 concerned about the starting date.

25 MR. SUMMIT: Paul Summit for defendant Thiam.

Plaintiff had requested that we complete the privilege log before motion practice. We are briefing motions to dismiss this month. We have already completed a very substantial document review and document production under this Court's order. What is left are the government privilege documents.

THE COURT: What is the scope of that, approximately, volumewise?

MR. SUMMIT: A little over 10,000 documents to review.

THE COURT: 10,000 are on the privilege log?

MR. SUMMIT: No. 10,000 are left now for review.

THE COURT: Of what you have reviewed, how many privileged documents are in issue based on this Thiam privilege?

MR. SUMMIT: I don't have a precise amount. These are the documents that were received or generated during his couple of years. We suspect that there will be a substantial number privileged under the government privilege.

THE COURT: He is no longer a government official, is that correct?

MR. SUMMIT: That's correct.

THE COURT: He still has the material?

MR. SUMMIT: That's correct.

THE COURT: I'm not sure there is a privilege there other than one that the government may want to assert. Has the government been notified?

1 MR. SUMMIT: The government has not been, but they
2 will be.

3 THE COURT: Why don't you notify the government
4 immediately, unless other parties think that we are just
5 opening a hornets nest. My view would be he has the documents,
6 he is no longer a government official, if the government
7 doesn't move for a protective order or whatever, no privilege,
8 let's just produce it.

9 MR. SUMMIT: We have absolutely no problem or
10 objection to notifying the government. We will do so
11 forthwith. Our understanding from our expert, and we will file
12 these papers, is that unless the government says otherwise,
13 there are substantial sanctions that could be levied against
14 Mr. Thiam.

15 THE COURT: Even when the government has had a chance
16 to protect its interest and has failed?

17 MR. SUMMIT: Governments are governments. Your Honor,
18 we would like to see these documents, frankly, released,
19 because they are exculpatory to us. But we can't put our
20 client into a position in which he is subject to sanctions.
21 And there may be, for all I know, legitimate governmental
22 confidentiality issues.

23 THE COURT: Who is going to make that decision?

24 MR. SUMMIT: You.

25 THE COURT: No, I'm not.

1 MR. SUMMIT: Let me put it this way. There is a body
2 of case law that gives U.S. judges a set of factors to consider
3 in connection with confidentiality asserted by another
4 government.

5 THE COURT: You just said the magic words, asserted by
6 another government. Mr. Thiam is not another government
7 anymore. And you know the solution under U.S. law merely on
8 confidentiality, which is produce it under a confidentiality
9 order. Unless there is a governmental privilege different from
10 confidentiality --

11 Frankly, on all of this we are now dealing with
12 foreign law, foreign government confidentiality concerns. How
13 am I going to make that decision? Even if you have an expert,
14 that may be an expert on the Ghanaian law of privilege. It is
15 not going to be an expert on what is confidential or sensitive
16 to the government, is it?

17 MR. SUMMIT: Actually, he will be an expert on the
18 statutory scheme of Ghanaian law which governs release of such
19 documents.

20 THE COURT: It is a sort of like saying, if this were
21 on the other shoe, that somebody would opine as an expert on
22 FOIA, Freedom of Information Act, as to how you can get certain
23 documents from the government. That is a different standard
24 than what has to be produced in civil discovery from a
25 nongovernment actor who happens to have nonstolen government

1 documents.

2 MR. SUMMIT: May I suggest the following. We will
3 notify the government forthwith by the fastest means we know
4 of. We may get clarity. They might say, we could care less.
5 They might say, we'll prosecute you if you release these. I
6 really have no idea what they are going to say. Let me do
7 that, and we will crystallize the issue then.

8 THE COURT: Does anyone with better knowledge than me
9 of the Ghanaian situation think that we are just making things
10 worse instead of better?

11 MR. LYTTLE: Your Honor, if I may, briefly. I think
12 we may be able to short circuit this. The government of the
13 Guinea is represented by a U.S. law firm, DLA Piper. We are
14 happy to provide that contact to Mr. Summit and see if we can
15 short circuit this and have American lawyers representing the
16 Ghanaian government weigh in.

17 THE COURT: The other thing I will tell you all now,
18 if it's a question of what does the foreign law say as a matter
19 of law, I would deal with that, subject of course to review by
20 Judge Berman. If it is applying that document by document to
21 more than 10 or 20 documents, you are going to a special
22 master.

23 MR. SUMMIT: Nobody anticipates such an exercise by
24 your Honor.

25 THE COURT: All right. Then I will leave that

1 briefing schedule where you have set it in the hope that by
2 February 20th it will be moot.

3 MR. SUMMIT: Very good.

4 THE COURT: Next, paragraph V, BSGR and Steinmetz.
5 Where are we on jurisdictional discovery production?

6 MR. FILARDO: Good afternoon, your Honor. Vincent
7 Filardo for BSGR and Mr. Steinmetz. We are substantially
8 complete, nearing completion of both our collection and review.
9 We will be prepared to meet our obligations by the 16th, this
10 Friday. We also will have the declaration that your Honor
11 asked for from Mr. Steinmetz, we will have that ready to be
12 produced.

13 We have reviewed several thousand documents that came
14 up through hits. It is actually, when you consider documents
15 and document families, probably less than 7,000 but on that
16 magnitude so far. We will alert the Court and plaintiff's
17 counsel that we have yet to find a responsive document in that
18 group.

19 If there is nothing to produce, we will let
20 plaintiff's counsel know in a cover letter at our deadline on
21 Friday. If there is something to produce, we will produce
22 that. If there are any privileged responsive documents, which
23 there are none of so far, we will produce a privilege log, too.

24 Your Honor, we have also been served with discovery
25 requests as provided in the letter to your Honor from defendant

1 Vale. I believe we have come to an agreement that we will not
2 need to respond to those substantive requests. They are not
3 jurisdictional discovery requests. We have not put in a
4 written response or objection to that thus far. We could
5 simply put in a letter objecting generally and asserting the
6 basis of our jurisdiction argument. I leave that up to your
7 Honor how you would prefer us to do that, if at all.

8 THE COURT: Mr. Liman.

9 MR. LIMAN: Your Honor, we did serve a discovery
10 request because we believed that ultimately, if jurisdiction is
11 found, the documents will be both relevant and exculpatory of
12 our client.

13 With respect to the issue of whether responses and
14 objections need to be filed now, we are prepared to do whatever
15 your Honor deems best. Plainly, we are not seeking merits
16 discovery, but discovery has been made so far as to
17 jurisdiction.

18 THE COURT: I don't see a need for more formal
19 response to preserve the records being transferred. However, I
20 am not planning to extend discovery past the end of this year.
21 I don't know when your motion is going to be decided and
22 therefore when you can impose on BSGR and Steinmetz for merits
23 discovery. Does it pay to, for at least document discovery
24 purposes, after X period of time goes by and there is no
25 decision, deal with it as a rule 45 subpoena or Hague

1 Convention or whatever?

2 MR. LIMAN: This is one of those instances where we
3 are on this side of the table and not on that side of the
4 table. From Vale's perspective, and I believe from Rio Tinto's
5 perspective, we would like the documents, and we think it
6 should be dealt with as a rule 45 subpoena in that
7 circumstance.

8 THE COURT: But where are BSGR and Steinmetz for that
9 purpose?

10 MR. FILARDO: Your Honor, we have document custodians
11 that are literally in multiple foreign jurisdictions. I guess
12 it would depend upon if we stuck to those same custodians, of
13 which there were a vast cross-section. I think there were six
14 different custodians that we have checked at least for
15 jurisdictional documents.

16 For argument's sake, assume it was that same amount.
17 That would cover five or six different foreign jurisdictions,
18 one or two of which may have more stringent rules than others,
19 two or three maybe would have more stringent rules than others.
20 At that point, if we were going to be looking at nonparty
21 subpoenas under rule 45, I think we would have to follow
22 whatever rules are going to be applicable in those
23 jurisdictions, whether Hague would work; if not, if federal
24 rules are acceptable. We have to meet and confer with the
25 other parties and see what exactly is available.

MR. LYTTLE: I would have to talk with Mr. Filardo more. I do have some concerns. I think rule 45 subpoenas could introduce some complexities that aren't otherwise there. We not a party, obviously. Quite frankly, perhaps I can talk about it with Mr. Liman and Mr. Blackman as well as Mr. Filardo and think about it a little more. I think this is a complex issue.

MR. BLACKMAN: I was going to say, your Honor, it would be great if these documents were subpoena-able. Indeed if they were subpoena-able from third parties, we might already be doing it, because that would not necessarily involve the jurisdictional issue that's been raised. I fear, knowing what I know about Mr. Filardo's client, that we may have to resort to the Hague or similar mechanisms if his client does not remain a party to this case.

THE COURT: The only question I invite you all to discuss is whether it makes sense to start the Hague route now, knowing how difficult it is and how long it takes, and hope, from your points of view but not from Mr. Filardo's point of view, that it becomes moot because the jurisdictional motion is denied and they are in as a party.

MR. BLACKMAN: I think that is a sensible suggestion that we can talk about amongst ourselves and at least prepare requests.

THE COURT: Do it with as much cooperation, including

1 Mr. Filardo and his clients through him, as possible. See
2 where it goes. If the decision is not made for a while and the
3 motion hasn't been made yet -- right?

4 MR. FILARDO: It has not.

5 THE COURT: We are talking two to three months at a
6 minimum for the motion to finally be made once jurisdictional
7 discovery is over, responded to, etc., and then decided. You
8 may not get an answer until after June 30th, when you hope to
9 have all the documents. If you wait until then to go Hague
10 Convention, you may have problems.

11 It may be that money talks. Under rule 45 there are
12 different obligations for costs. Maybe if you are willing to
13 gamble your money either on a refundable or nonrefundable
14 basis, they might, or might not, make certain productions
15 through a more civil procedure route than a Hague route. Keep
16 talking about this. I will ask you to report back at the next
17 conference.

18 MR. BLACKMAN: Thank you. I think it is a sensible
19 suggestion. Sooner rather than later I think is the watch
20 word.

21 THE COURT: Paragraph VI, the VBG defendants,
22 something was due last Friday. Where does all that stand?

23 MR. AUERBACH: Martin Auerbach for the VBG defense.
24 We did serve our responses to the discovery demands, both
25 document and interrogatories, last Friday.

1 THE COURT: Did that include the documents or just the
2 formal responses?

3 MR. AUERBACH: I thought I would take a minute to
4 bring your Honor up to date. Our discovery requests, as you
5 may be aware of or not, came much later than everybody else's.
6 We got ours just before Thanksgiving. We have had a very
7 constructive dialogue with plaintiff's counsel with respect to
8 the state of the documents and state of the witnesses.

9 The key to that entire picture is the fact that in May
10 of 2013 the Ghanaian government came and executed the Ghanaian
11 equivalent of a search warrant and took all records through the
12 end of 2010. Prior to that point in time, in October 2012, the
13 Ghanaian government put this project on hold. It froze the
14 project.

15 Ultimately, when that happened, what happened on the
16 operational side is that the process went from being an
17 operating business to being essentially an asset. They had
18 about 3,000 people on the payroll. They were technical people
19 who had come in from overseas. They left. The mining experts
20 who were left, they left. The people on the ground who now
21 remain are a skeleton crew and security guards, their assets,
22 their cars.

23 That has in some ways made my life easier, because the
24 documents that they are most interested in are not in their
25 hands, they are in the Ghanaian government hand. I am happy to

1 announce today that the Ghanaian government has counsel in the
2 U.S. If they get production of those documents, perhaps we
3 will get to see them, too.

4 With respect to electronic communications, because
5 Ghanaian infrastructure, unlike some Third World countries, is
6 not that advanced, VBG has never had its own electronic
7 service. All of that has been hosted, certainly post-joint
8 venture by Vale, part of the joint venture I believe by BSGR,
9 though I am uncertain as to that.

10 I have undertaken to endeavor to determine who
11 potential custodians before the people who are now responsible
12 for the joint venture were. It is complicated a bit by the
13 health situation, which has resulted in all of the senior
14 management, of whom there are now only two, leaving the
15 country. They are afraid. I speak to them.

16 This past week as we were trying to sort through the
17 issues. The very terrible communication in France precluded my
18 communicating with them because they still communicate through
19 cell phones that operate out of Africa, and clearly the French
20 government decided they didn't need any African communications.
21 I have been able to reconnect this week, and we continue to
22 discuss where the documents are.

23 As I say, the electronic communications, to the extent
24 they exist, are best sought from Vale because we don't have
25 them. Our records are gone, so I can't tell them who was

running the show back in 2008, '09, '10. I believe that the parents, if you will -- at different points in time it was different entities -- can answer those questions. I'm working with them to encourage that sort of undertaking. Hence, my inability to currently produce anything.

Rather than given the timetable, I didn't want to simply assert that I was not going to respond. We have responded.

The one form of discovery that we have not had, and I will explain my understanding as to why, is jurisdictional discovery. Your Honor knows that since July 18th, 17th, 18th, we have advised the plaintiffs and the Court that we do not believe that there is any jurisdiction with respect to the VBG entities.

VBG Guernsey is simply a corporate secretary holding the ownership of the Guinean entity. VBG Guinea, as I will refer to it, is a company that does not now and never has and certainly at the time the suit was brought did not have operations or a presence in the United States, so no general jurisdiction. Nor are there any general jurisdictional allegations in the complaint.

With respect to specific jurisdiction, again, no jurisdictional pleadings other than that there is a conspiracy here and that everyone in the conspiracy is everyone else's agent, and therefore, if you have jurisdiction over the

1 co-conspirators, you have jurisdiction over us.

2 I don't believe, based on my research, that that is an
3 accurate reading of the law. But in terms of factual
4 predicate, there is nothing in the complaint to suggest any
5 specific action by VBG in the United States, which makes their
6 decision not to serve jurisdictional discovery perfectly
7 sensible.

8 I don't want to find myself in front of Judge Berman
9 saying -- I'll probably take the least of the brief in any
10 event, because I'm the smallest player -- saying that
11 essentially if you look at the face of the complaint, there is
12 a theory of co-conspirator liability, so in essence
13 jurisdictional discovery is largely irrelevant based on the
14 pleadings. I just wanted to fill you in.

15 THE COURT: I appreciate that. Plaintiff?

16 MR. LYTTLE: Your Honor, quickly, we have had very
17 good private discussions with Mr. Auerbach about where the
18 documents are.

19 THE COURT: Let's start with the jurisdictional
20 discovery related or not discovery issue. I have assumed that
21 the only people we were dealing with on that is what we have
22 been going through with Mr. Filardo.

23 MR. LYTTLE: Your Honor, the discovery against VBG,
24 the discovery we served, Mr. Auerbach is charactering it as
25 merits discovery, but it was merits and jurisdictional

1 discovery. As we have dealt with often with Mr. Filardo, there
2 is quite a bit of overlap there. Our view is that the
3 discovery we served is responsive to both merits and
4 jurisdictional.

5 THE COURT: If you are not getting any of that, what
6 is that going to do to the jurisdictional issue?

7 MR. LYTTLE: As Mr. Auerbach said, we have a number of
8 bases of jurisdiction, whether it is Federal Rule 4(k)(2),
9 whether it is the New York long-arm statute, whether it is the
10 RICO statute itself. We would like to get documents. It
11 doesn't sound like we are going to get very much. We are still
12 talking about that with him.

13 THE COURT: The motion is going to get made as soon as
14 Judge Berman clears you to make it and as soon as Mr. Filardo's
15 client has completed its jurisdictional production, which
16 sounds like it will be Friday. When you see Judge Berman next
17 week, you are all asking for a briefing schedule, right?

18 MR. FILARDO: That's correct.

19 THE COURT: OK. Keep talking with respect to figuring
20 out where any documents are, whether it is jurisdictional or
21 merits or otherwise.

22 MR. AUERBACH: Absolutely, your Honor. The only thing
23 I would say in terms of guidance as to the jurisdictional
24 allegations specific jurisdictional, I can get a declaration
25 from people saying we have no presence. But in terms of

specific jurisdiction, I don't see anything in the complaint that gives you guidance on what I would be looking for, frankly, if I had documents to look at. That's why I raise this with you, your Honor.

I want clarity because I don't want to go to Judge Berman and say we believe there is no jurisdictional basis here because none is alleged and then have the plaintiff say sure it is alleged. It may be that 4(k)(2) and 1956 are essentially it. In terms of long-arm jurisdiction, I believe that the theory is, as I said, that co-conspirator liability creates jurisdiction rather than anything specific that VBG, either the Guernsey or Guinean entities, which operate exclusively in foreign jurisdictions, has done here. That's all.

MR. LYTTLE: Your Honor, I like Mr. Auerbach a lot, but I think he is mischaracterizing our allegations a little bit. I do think our discovery was directed at finding what activities and what knowledge they had of the co-conspirator activities. That is really what our focus is on jurisdiction here.

THE COURT: Assuming they did nothing in New York, you are, I take it, relying upon the fact that they are allegedly in a conspiracy with other folks, etc., not that there is some other transaction that somehow or some other theory under the C.P.L.R. somehow gets you jurisdiction over them?

MR. LYTTLE: That's correct, your Honor, with the

1 caveat that our discovery was designed to find out are there
2 other things like that, if you do anything affirmatively in New
3 York that we don't know about, anything independent of your
4 co-conspirators. If they don't have anything because they
5 don't have the documents, that's fine. But what I do dispute
6 is that we haven't sought that information. They may not have
7 anything, but we have sought it.

8 THE COURT: I understand each of your positions.
9 There is nothing further to do on it now.

10 Now we can get to the bigger gun, which is Vale.
11 Let's take the issues one at a time here, which I think is the
12 custodian issue. Are you resolved on that or not?

13 MR. LYTTLE: Your Honor, it is our position that we
14 are resolved, Rio Tinto custodians have resolved those. We
15 believe we have reached agreement with Vale. I will let them
16 speak to this. They have reserved some rights for this vague
17 idea of let's agree on scope first. But our view is we've got
18 custodians, let's move forward, let's stop doing this
19 piecemeal.

20 THE COURT: Who am I going to hear from on the Vale
21 side?

22 MR. LIMAN: Your Honor, we have agreed, as the letters
23 indicate we would, on the custodians who will have relevant
24 documents. Those are the custodians that we have discussed
25 with them. What we have reserved is that if it is determined

1 that the requests based upon the search terms or the predictive
2 coding that we use yields too many documents, we would have the
3 right to go back to them, and they would have the right to go
4 back to us and say we should drop this from the search.

5 THE COURT: That sounds acceptable. The letter is
6 sort of all over the board, so why don't you raise an issue,
7 tell me where in the letter you have raised it, where in the
8 letter they respond to it, and we will try to get through this
9 before the next conference shows up in 45 minutes.

10 MR. LYTTLE: Your Honor, I think we can kind of cut
11 through the morass here. I think there really are two
12 overarching issues with respect to our disputes on Vale's
13 production and responsiveness. I think that we can get a
14 resolution and guidance from the court. It will trickle down
15 and resolve a number of other small issues.

16 A little quick background. We did serve discovery
17 over six months ago. You have all that.

18 THE COURT: I don't want that background. I got that.

19 MR. LYTTLE: Here are the two overarching issues I
20 would like to cut through with. Number one, Vale is trying to
21 cut discovery off at either June 2009, which is when the
22 negotiations with Rio Tinto formally ended, or April 2010,
23 which is when the joint venture with BSGR was announced.

24 Your Honor, this conspiracy was an ongoing conspiracy.
25 This conspiracy didn't end in 2009, when the negotiations

ended. And this conspiracy didn't end in April 2010, when the joint venture was entered. We have alleged and know of numerous acts this conspiracy undertook after April 2010, after the joint venture.

We have numerous meetings in 2009 and 2010 between Vale and representatives of BSGR. We have bribes in June of 2010. We know that in 2008 and 2011 Mr. Thiam was working with the conspiracy to exert pressure on Rio Tinto to relinquish its rights to plots 1 and 2. And we know from 2010 to 2013 the conspiracy was actively using Rio Tinto's information for the joint benefit of that joint venture between Vale and BSGR.

So, our discovery is necessarily broad to get at what information they were using, when they were using it, how they were using it. This particular joint venture, a little context, and I think Mr. Auerbach touched on it, this joint venture itself was a product of and tainted by this conspiracy. This joint venture had its rights stripped by the government of Guinea in 2012 and its documents are all taken.

THE COURT: I understand the argument. Let me hear from Mr. Liman.

MR. LIMAN: Your Honor, it is not true that we are seeking to cut off discovery on any of those particular dates. Let me tell you what is correct. The allegations here in the claim center on the claim that Rio Tinto wrongfully lost its concession and that the defendants stole the concession. That

1 event took place, according to the complaint, in December of
2 '08, when the government of Guinea announced it was taking the
3 concession from them. They allege that it was confirmed in
4 June of '11.

5 That is the RICO allegation, the fraudulent
6 concealment allegation, fraudulent inducement. Roughly
7 parallel, the claim there is that Vale was in discussions with
8 Rio Tinto up until June of '09, and while we were doing all of
9 these allegedly nasty things, we didn't tell Rio Tinto.

10 What we have proposed, and we would like to have Mr.
11 Reents address the details if your Honor has them, is a staged
12 production, which we have already started, that would expedite
13 the production of documents and help us get through all of this
14 under the deadlines provided by the Court.

15 The staged production would have us, and this is where
16 we have already started, look at every communication from the
17 custodians to BSGR in the period up until June of 2009, every
18 communication of those custodians reflecting that there had
19 been communications with BSGR up until that time period. That
20 is the way to figure out whether there was in fact confidential
21 information conveyed.

22 We are taking their allegations on their face, as we
23 are required to do. Contrary to has been told to us by the
24 client, we are assuming that there was confidential
25 information. If that is the case, we will learn that from the

1 production that we have already started to do.

2 What we have done is we have looked for the nine
3 custodians. So far we have determined that there are no
4 documents among those nine custodians that reflect
5 communications to BSGR during that time period. Not a surprise
6 to us, because the negotiations over the joint venture began
7 later than that. And there are no communications reflecting
8 communications. We have also suggested some search terms.
9 What we have told the plaintiffs is that we expect by the end
10 of February we will be done with that work for all of the
11 custodians designated by the plaintiffs.

12 We have also proposed and we have shared with your
13 Honor some additional search terms. Your Honor will recall you
14 ordered the plaintiffs to designate the documents that they
15 allege were misappropriated. They did it. They designated
16 those documents. We have taken their production numbers on
17 those documents, essentially similar to Bates numbers, and we
18 have agreed to run those through our database to see if there
19 is any information.

20 Then what we would do, and I think this largely moots
21 the issue, is we will have a discussion. If there are
22 documents that were misappropriated or data that was
23 misappropriated, we will have far better tools.

24 THE COURT: This isn't working. To a certain extent
25 I'm loath to dive in on this. It may ultimately be you will be

1 right, you will win, and this will be a tremendous cost to Vale
2 for no benefit. But what I am hearing is, using your approach,
3 there are no responsive documents.

4 MR. LIMAN: That is not correct, your Honor.

5 THE COURT: Then what did I miss? You said for the
6 first nine custodians you didn't find anything.

7 MR. LIMAN: That is correct for the first nine. My
8 expectation is, if their allegations are correct, we should
9 find documents.

10 THE COURT: But you are not going to convince them to
11 drop the case because when you finish the 22 custodians, the
12 other 13 to get to 22, there are still no documents that match
13 the search approach you are taking.

14 MR. LIMAN: You're right, your Honor. I'm not seeking
15 to convince them to drop the case. What I am seeking to do is
16 to prevent a duplicative or wasteful search later on. What we
17 are proposing would have us within a month essentially gather
18 the information that you would use for putting together seed
19 sets for predictive coding. If there are documents and data
20 that was taken -- they have said they don't know, they can't
21 identify what the documents are.

22 THE COURT: This, I take it, is broader than the issue
23 of did you use the documents, let alone did you use the
24 information in the documents, and it is not really helping me.
25 The use of the information or the information from the war

1 room, the data room, is, I think everybody would agree,
2 extensive and overlapping or duplicative of normal business
3 operations, and neither side seems able to cut through the
4 morass.

5 So, whether it is going to be through the predictive
6 coding, whether it is going to be through a cost cap -- my
7 friend Judge Grim in Maryland in certain cases says ask for
8 whatever you want, but after the responding party has spent X,
9 we're done.

10 MR. LIMAN: Your Honor, if I could have my colleague
11 address predictive coding. We have actually spent a fair
12 amount of time thinking about that as an approach to this.

13 THE COURT: I thought we were done with the predictive
14 coding issue because you all are nearing agreement, etc., and
15 you want a little more time, but that there is a major issue on
16 the time period cutoff that is not resolved.

17 MR. LIMAN: Your Honor, that is not true. There is no
18 issue with respect to the time period cutoff. What there is is
19 an issue with respect to the methodology and the scope.

20 THE COURT: Are you saying that if we went with your
21 tiered approach, that when you hit predictive coding sometime
22 in late February or early March, that we are not worrying about
23 a June '09 or April 2010 cutoff but we are going all the way
24 through sometime in 2013? Mr. Reents?

25 MR. REENTS: There are a number of different requests.

Of course, there are other requests where there isn't a dispute and we have reached agreement with plaintiffs and we can use predictive coding for those requests.

With respect to these requests, I think the predictive coding is a bit of not a red herring exactly, but it is not a complete solution, because the problem isn't just our search methodology. The problem is that we disagree on the substantive scope of this request. According to plaintiffs, the scope of this request is basically anything having to do with geology, transport, or ports around Simandou, which amount to the whole ball of wax. Predictive coding doesn't address that.

THE COURT: I'm not sure that your proposal addresses it, either, other than in a very narrow sense.

MR. LYTTLE: Your Honor, if I may, I think you put your fingers on the issue. Their proposal is not satisfactory. I will get into the reasons why. It is going to take time to do this piecemeal approach, and we are going to be back where we started.

THE COURT: Tell me what you would like them to do on this.

MR. LYTTLE: What I would like to do is what we are going to do. We have identified a custodian. We actually have collected documents from all of our custodians. Let's get the set together, let's run our search.

1 THE COURT: Here is my question. Have you talked to
2 your folks at Equivio, and ultimately you will need to talk to
3 Deloitte -- I'm separating whatever you have to do to produce.
4 For Vale's production, how is the predictive coding engine
5 going to separate or output in Simandou in the regular course
6 of the joint venture business from the ore output or other
7 issues that were in some of the documents in what I am calling
8 the war room that you say was misused by them? I don't see,
9 frankly, how predictive coding is going to figure that out.

10 MR. LYTTLE: I think you are correct, your Honor. But
11 I think that doesn't need to come out. What we would like to
12 see and what we are entitled to see in discovery --

13 THE COURT: The question is going to be volume and
14 expense. Are you prepared to pay any of the expense of
15 attorney review time and/or vendor time?

16 MR. LYTTLE: We could certainly discuss that if the
17 burden is extensive. But let's get on with the coding, let's
18 do the seed set, see what it looks like, and address that.
19 That is what we propose to do.

20 THE COURT: Have you talked to your vendor about that?

21 MR. LYTTLE: About what? I'm sorry, your Honor.

22 THE COURT: About whether that is realistic. If you
23 put a million documents in or whatever the number is and they
24 all have to do with the operation of this Simandou mine, I'm
25 not sure that the predictive coding system is going to do

1 anything other than mark all of that as relevant.

2 MR. LYTTLE: Your Honor, we have given them search
3 terms on this issue. It came back with only 250,000 documents.

4 THE COURT: Are you satisfied that they will have met
5 their production obligations if they produce the 250,000 hits?
6 That's got nothing to do with predictive coding, which is why
7 I'm a little frustrated that you are both all over the place.

8 MR. LYTTLE: We are frustrated, too, your Honor. My
9 point is we gave those search terms to gain an understanding of
10 this overall burden when we look at implicating these day-to-
11 day business operations or whatever. My point is these search
12 terms only capture 250,000 documents from nine custodians.
13 Even if you double that, and it is not clear these next set of
14 nine custodians would have the same number of documents, you
15 are still talking about 500,000 documents to review, which your
16 Honor in a case this size and with these allegations.

17 The problem with their search terms and their proposal
18 is that it doesn't capture when they pull information out of
19 the document and they stick it into a PowerPoint or they email
20 and talk about it. There is no way to capture that.

21 MR. REENTS: Your Honor, could I address this?

22 THE COURT: Why don't you first address why, if it is
23 250,000 documents, although there is a suggestion that their
24 number is off, why that is a big deal in the grand scheme of
25 things in a case like this, where there are 15 lawyers sitting

1 in front of me, four of whom I think are from your firm, maybe
2 more.

3 MR. REENTS: A few points, your Honor. The first is
4 of course, as counsel noted, the collection isn't complete yet
5 so there is more to come. That is not the sum total. That is
6 just the emails. Also, this is just one issue among many
7 issues in this case. As Mr. Liman was pointing out, not even
8 the most important issue, not by far.

9 The critical issues here are the formation --

10 THE COURT: Folks, either you all have to reach
11 agreement on your own, which requires compromise, or you risk
12 either a special master who can become expert on mining, etc.
13 Yes, this is only one issue, but your approach seems to be
14 turning up nothing. Their approach on the issue that I am
15 trying to get my hands on is 250,000 documents, which in the
16 grand scheme of things, even if this is just one issue in a
17 multiissue case, is not the end of the world.

18 MR. REENTS: Your Honor, I guess we have a different
19 view. Perhaps most distressing is that we have reached the
20 point where 500,000 documents is a pittance.

21 THE COURT: That is the world we are in.

22 MR. REENTS: The burden is not just the amount but the
23 breadth.

24 THE COURT: Have you shown through analyzing the hit
25 reports what the overbreadth is? Somewhere in these

discussions there is a discussion of PDF versus the Adobe use of the same term.

MR. REENTS: I think that is a red herring. That is not the term we focused on, although it did get a lot of hits. Some of the terms they proposed, like "BSGR," our partner in this venture, returned 25,000 documents. The word cap "X demand" with "Simandou," among other terms, these are the sorts of terms that they really are trying to capture, essentially all of the operations of this mine. It becomes a fishing expedition where they can look for the evidence that they are looking for.

THE COURT: There are two things you can do. You can either use those terms and perhaps an even broader set to load all those documents, then do predictive coding, and come up with a way for the predictive coding system to do further winnowing, knowing that it is not how many times a particular hit occurs if you are not then accumulating; if the same document has five different terms, that is only one document.

They say it is roughly 250,000 documents.

MR. REENTS: That's what our hit report shows cumulatively for the terms for the nine custodians.

To take a step back, your Honor, if I may --

THE COURT: Have you analyzed those documents as opposed to the hits on a sample basis? Right now I'm hearing it's way overbroad, it's just because BSGR is our joint

1 venturer, and your approach is extraordinarily narrow, their
2 approach is broad, perhaps too broad, perhaps not.

3 What is the Court supposed to do with this amount of
4 information or lack of information? I've got to tell you, it's
5 a sad shape that we're in where I can say a quarter of
6 a million documents is not a big deal on a case this size. But
7 you are billing, I don't know, \$5,000 an hour for you and Mr.
8 Liman and Mr. Blackman and one or two other people there your
9 firm to be here.

10 I'm inclined to say review the 250,000 documents.
11 Review and produce them. That will give all of us a better
12 feel. I can just say that or you all can decide with this as a
13 strong push to have further productive discussions. It seems
14 like every conference we are going through this same issue in a
15 different form or another because of, yes, the vagueness of
16 what was in the war room and the fact that that overlaps with
17 normal business decisions.

18 MR. LYTTLE: Your Honor, if I may?

19 THE COURT: You could snatch defeat from the jaws of
20 victory.

21 MR. LIMAN: Your Honor, unfortunately, my guess is
22 that this is an issue that is going to continue in the case.
23 Let me tell you the reason why I think that. If there is no
24 definition put on what it is that we allegedly gave prior to it
25 being taken, then we have defenses we are entitled to assert,

1 including asking them who else did you share information with
2 Simandou about.

3 THE COURT: If they wind up causing themselves
4 burden --

5 MR. LIMAN: But they persist in that.

6 THE COURT: Let me put it this way, Mr. Liman. I have
7 tried once to get a better feel from you for what was in the
8 war room that they are complaining about. That hasn't really
9 helped you. I understand that.

10 MR. LIMAN: I think it did help us, your Honor.

11 THE COURT: Good. How does that help me?

12 MR. LIMAN: I think it defines the universe of
13 documents. What we have done is take your Honor's orders
14 seriously. We have started from the nine documents. We have
15 proposed to them search terms from those nine documents. We
16 proposed codes from those nine documents.

17 We have indicated we would be open to other terms from
18 those nine documents. We are not saying that we are limiting
19 things. That is the whole notion of adding the search terms
20 that we have proposed. We are not saying that we are limiting
21 things to the communications with BSGR. We do think it is
22 highly probative that there was no back-and-forth.

23 THE COURT: Mr. Liman, stop. Thank you.

24 What was the response to their key words?

25 MR. LYTTLE: Your Honor, first of all, we just got

1 them this morning -- excuse me -- late last night. It is
2 laughable, your Honor. It is terms like "Simandou and steal"
3 or "misappropriate"? It completely ignores how they would use
4 the data.

5 THE COURT: Is the word "fraud" or "RICO" in the list?
6 I'm being facetious.

7 OK. You have two choices. The best I can do with all
8 of this is say review and produce from the 250,000 documents.
9 If you would rather have a special master try to spend weeks
10 and weeks -- and this one may be at your expense, not split --
11 dealing with this, I'm happy to have you do that. But I can't
12 micromanage this discovery. That is not the purpose of the
13 Federal Rules of Civil Procedure.

14 You seem to be having the same problem every single
15 conference. I was not as upset with the slowness that you were
16 operating under while the first motion to transfer venue or to
17 dismiss in favor of England was briefed. I thought that there
18 was perhaps mutual agreement to go slowly while that was going
19 on.

20 You are here. Yes, maybe Mr. Filardo's client will be
21 dismissed, maybe there are other motions to dismiss coming, but
22 it is now full speed ahead. You have less than a year to
23 complete this. If we keep going in circles, you are not going
24 to do it and somebody is going to be very aggrieved when on
25 December 31 I say I don't care who has been deposed or who

1 hasn't, we are done.

2 MR. BLACKMAN: Your Honor, why would it not make sense
3 if we produce the 250, which I think will probably be a lot of
4 chaff and very little wheat, that they pay if it is determined
5 that in fact the number of pieces of wheat to the number of
6 pieces of chaff is such that this turns out to not be --

7 THE COURT: Pay what?

8 MR. BLACKMAN: They pay some portion of the cost of
9 doing this. The problem we have is this. We were thinking of
10 stages. I know it is something your Honor has talked about in
11 the past as a sensible way to go. The claim is that we helped
12 BSGR steal their concession. Well, their concession was stolen
13 on December 2008 or at the latest, according to them, June '09.

14 We said a good first stage would be to see what, if
15 anything, we gave BSGR during that period. The answer is
16 probably nothing. The answer is probably that we didn't even
17 have discussions of any kind with BSGR except passing hellos
18 during that period. That is one thing. If that's not enough,
19 the other thing is bribery and corruption. That's what this
20 case is about. We are prepared to say we will look for bribery
21 corruption payment type documents.

22 Then we have the third issue, which is what we are
23 talking about here, where they have essentially said that
24 everything this joint venture did is potentially criminal. You
25 have agreed that that doesn't make sense, because digging ore

1 out of the ground is not criminal, paying a worker, putting
2 stuff in a cart, etc.

3 Since we are now in that third and vastly larger and
4 least relevant bucket, why shouldn't they have to at least pay
5 part of the cost of our getting into that bucket in terms of
6 proportionality and benefit versus cost? It seems to me that
7 is consistent with the law under rule 34, and it would make it
8 at least a little fairer if we have to go through this
9 exercise.

10 THE COURT: Merely as a parade of horrors, perhaps
11 realistically Mr. Liman is saying you are going to ask for
12 something equally broad of them.

13 MR. BLACKMAN: They are resisting discovery. I'm
14 going to get to that when you get to that in the letter. That
15 is another issue, sauce for the goose.

16 THE COURT: What is the plaintiff's view on cost
17 sharing for that 250,000? Of course your answer first is no,
18 so give me your second answer.

19 MR. LYTTLE: Our answer is no because, your Honor,
20 that discovery is perfectly appropriate for this size case.

21 THE COURT: It depends on what the result is.

22 MR. LYTTLE: Understood.

23 THE COURT: If the result is that it is all garbage, I
24 guess I'm asking you this. You can buy a pig in a poke or you
25 can have the Sword of Damocles hanging over your head. I can

1 cost shift after the fact, but then you are not being able to
2 make a decision of do you really want this method of getting to
3 the 250,000 documents if you are paying for a decent chunk of
4 it, or would you do something else, or you could decide to cut
5 a deal that you will pay X percent now and then, it is a
6 percent of what.

7 MR. LYTTLE: Your Honor, to answer your question
8 shortly and distinctly, I'll take the Sword of Damocles. I'm
9 confident on search terms, I'm confident on our allegations.

10 THE COURT: People have to learn short answers, not
11 essays. Produce the 250,000 hits and I'll reserve and you can
12 make a motion for cost sharing. Make sure you have kept good
13 cost records, both at the vendor level and at the law firm
14 level, as to what you are doing and what the costs are.

15 MR. LYTTLE: Your Honor, could we also ask that they
16 run the search terms against the remaining custodians?

17 THE COURT: Let's see the result quickly for the first
18 nine custodians. If it turns out it is garbage -- let's put it
19 this way. Run it over the remaining custodians so we have a
20 hit total to compare. Maybe the custodians are not equal and
21 there will be fewer hits in the remaining 13 than there were in
22 the first nine or maybe it will be three times the number of
23 hits. But you don't have to actually produce that until we get
24 a feel for what the production of the first 250 is.

25 What else? We are running out of time, and in

1 fairness I have to deal with their document requests to you.

2 MR. LYTTLE: Your Honor, on the search term point, we
3 are still in discussions about predictive coding. We still
4 believe predictive coding is a productive way to do this.

5 THE COURT: For a lot of this, I agree. For certain
6 other things I think it won't work.

7 MR. LYTTLE: I was asking if you could also order that
8 they gather all 22 custodians and run it. Let's do this the
9 right way instead of continuing to tier this out.

10 THE COURT: This is something you are all going to
11 have to work on together by yourselves or with a special
12 master. I really find the way you are all doing this, with
13 nobody giving much on anything and everything being we are
14 almost in agreement, we are still working on agreement . . .

15 What else do you need a ruling on from plaintiff's
16 side today? I would like to see, and I'm obviously going to
17 bring you back shortly, where you are on the predictive coding
18 issue.

19 MR. LYTTLE: Your Honor, the other issue that I wanted
20 to cut through, the second one, we kind of touched on it, we do
21 not need to further specify or identify. I think we resolved
22 that.

23 THE COURT: That is correct. You have done as good a
24 job as you are going to do on that. You will win or lose down
25 the road accordingly.

1 Defendants' issues to the plaintiff.

2 MR. BLACKMAN: Thank you, your Honor. The fact of the
3 matter is that other than what we received literally on Friday,
4 we haven't received any documents. What we received on Friday
5 were some, but, they submit, not all of the documents which BHP
6 Billiton has run at them, which is the basis on which the Court
7 knows they invited us in as a potential white knight.

8 You ordered them on December 9 to produce the
9 documents dealing with their investigation of this supposed
10 conspiracy and bribery, etc., which are critical documents
11 because they are the basis on which they claim that their
12 lawsuit against Vale is --

13 THE COURT: Stop.

14 MR. BLACKMAN: We haven't gotten a single document
15 yet.

16 THE COURT: When is it going to be produced?

17 MR. LYTTLE: I'm sorry. What were you asking for? I
18 apologize.

19 THE COURT: The BHP material.

20 MR. BLACKMAN: BHP I left. I was going on to the next
21 one. Tell me when you are going to have the BHP by all means.

22 MR. LYTTLE: We are pulling documents from various
23 enterprise vaults and archives. We pulled the documents over
24 the holidays. We did the best we could --

25 THE COURT: Come on. Give me an answer.

1 MR. LYTTLE: I knew you were going to ask. I do my
2 best with my vendor. Two, three weeks.

3 THE COURT: Two weeks, period. Get it done. Have
4 them do overtime if need be. Get it done. Two weeks from
5 today.

6 What is the next issue?

7 MR. BLACKMAN: The next thing which I transitioned
8 into, perhaps not clearly, was the fact that the Court ordered
9 them to produce on December 9 the documents that were not
10 privileged, fact documents, dealing with their investigation,
11 and ordered them to produce a privilege log of what they claim
12 to be privileged, which of course we challenge on waiver.

13 Your first step, which you were very clear and
14 unequivocal about, was produce the nonprivileged documents and
15 give me a log. We haven't seen hide nor hair of either a
16 document or a log. We would like the same date you just
17 imposed on them as the outside date that we get that, because
18 that is critical to the limitations issues and it may indeed
19 form the basis for an early summary judgment motion on that.

20 THE COURT: There are no early summary judgment
21 motions.

22 MR. BLACKMAN: In any event, it is critical and you
23 ordered them to do it.

24 THE COURT: When?

25 MR. LYTTLE: Your Honor, we were collecting the

documents as part of the larger productive set. Again, we don't want to do this piecemeal. It is not efficient. That is our view.

THE COURT: I got you. Here is what we are going to do. You are all going to come back very shortly, you are going to bring the folks from Equivio and Deloitte, and you are going to produce to the Court a complete, hopefully agreed upon, protocol. Frankly, if you don't have an agreed-upon protocol on both sides for everything, whether for all predictive coding, predictive coding for this issue, key words for another, I don't care how you do it, I want to know how we are getting all this done and when and who you want as your special master, unless that protocol is completely agreed upon. Enough is enough.

MR. BLACKMAN: Your Honor, I haven't heard that this is a predictive coding issue. They were ordered to do this. They knew what their investigation produced.

THE COURT: What they are saying is it makes sense to do it as part of the bigger predictive coding that they are going to run on all of their data.

MR. LYTTLE: Correct.

THE COURT: I'm taking them at their word and modifying my prior order to allow them to do it once, except for the BHP, which they have two weeks to finish. How soon will you be ready on both sides to have your predictive coding

1 protocol and any other protocols that will have what you are
2 doing, when it is being done, all the steps, and that your
3 vendors have talked to you about it, that it is actually going
4 to work? Tell me when you want to come back.

5 MR. REENTS: Do you want an answer now?

6 THE COURT: Yes.

7 MR. LYTTLE: The 23rd through the 29th we are not
8 available. Other than that, we will come before or after. We
9 will be prepared.

10 THE COURT: If it is before the 23rd, that's nine days
11 from now. Do you really think you will be ready? Your
12 colleague is shaking his head no, and I think he is realistic.

13 MR. REENTS: Your Honor, we propose that we add them
14 on in the first week of February.

15 MR. LYTTLE: The first week of February is preferable
16 to us.

17 THE COURT: The first week of February is Legal Tech.
18 I can get you in in the afternoon of February 6th. 2 o'clock
19 on February 6th with vendors. I'm very serious. Use your time
20 well because by February 6th you are then down to four months,
21 five months I think, to make the complete production. Use your
22 time between now and then well.

23 I think that is probably going to include that you
24 agree upon a special master candidate. If you want names, I
25 can give you names of former judges who are around. If you

1 want to just do it on your own so I'm not putting my thumb on
2 the scale at all, that's fine.

3 MR. LYTTLE: Your Honor, we collected some names.
4 None of them are predictive coding experts. I'd love to have
5 some names from you.

6 THE COURT: As to a predictive coding expert who may
7 or may not have the least bit of inclination to do this or her
8 firm may not allow her, Maura Grossman at Wachtell Lipton is
9 probably the world's leading expert on predictive coding among
10 lawyers. She also works with Professor Gordon Cormack, a
11 computer scientist from University of Waterloo. That would be
12 my first choice. She and I work very closely together at
13 conferences. You may consider that a plus or a minus.

14 Your vendors can probably come up with names of
15 lawyers with some skill in this area or vendors with some
16 skill. But in terms of the more general discovery-related
17 issues, I think if you keep going the way you're going, you're
18 going to need a special master there, and that should probably
19 be a former federal judge.

20 MR. BLACKMAN: Your Honor, if I could address a couple
21 of points in the time remaining. One I need to just raise for
22 the record right now. The Court made it clear that you are not
23 going to extend deadlines. What we don't want to be in a
24 position of, it would be very unfair, getting on June 30 a log
25 and discovery is now over on documents and we have to now

1 litigate the issue of their at issue waiver.

2 THE COURT: It is not going to take until June 30 to
3 get this done. But assuming that they are using predictive
4 coding -- and you will have some say in this. It is a
5 negotiated protocol. If it makes sense to use the predictive
6 coding process to find the investigation documents, privileged
7 and nonprivileged, they can't do a privilege log until they
8 have done the document search and culling.

9 I understand it would be nice if they were doing it
10 sooner rather than later. To the extent that one needs to
11 search law firm files to get to these documents, unless you are
12 going to throw your files into the predictive coding engine, it
13 might make sense to log those documents, either document by
14 document or in whatever categorization is acceptable, if any,
15 to both sides so the Court can deal with that issue, perhaps.

16 MR. BLACKMAN: Your Honor, you read my mind on the
17 next point I was going to raise. One of the law firm files
18 that is involved is my friend's. They started, I believe,
19 doing this investigation years ago when they were at Weil
20 Gotshal and took it to their present firm.

21 There is a serious issue there, which I hate to raise
22 but have to because I don't want to be accused of waiving it,
23 about lawyer witnesses, if it turns out they are going to be
24 defending at a trial, if there is one, their investigation. We
25 don't know and we won't be able to know what's there until we

1 do this discovery. But I do want the record to be clear that
2 we are not waiving a potential lawyer witness rule
3 disqualification if that is where the evidence takes us.

4 MR. LYTTLE: Your Honor, this is the first we have
5 heard of this. None of the lawyers, including the in-house
6 lawyers, let alone the outside lawyers, have any first-hand
7 percipient knowledge of the investigation or the witnesses
8 spoken to in that investigation other than company witnesses
9 interviewed in the normal course. The attorneys are not going
10 to be witnesses here.

11 In fact, your Honor, actually on the privilege log, we
12 talked about it. We were not planning to search law firms. We
13 have added two in-house counsel, the communications. They were
14 the ones who led the investigation. We added those lawyers at
15 their request. We will search their files, and communications
16 with us as lawyers to them will be logged.

17 We did not understand your Honor to say and don't
18 think the case law requires a search of lawyer files as well,
19 because any relevant documents that need to be logged will be
20 captured in the search of the in-house lawyers. We are not
21 going to log all of our --

22 THE COURT: Certainly if that is true, then you don't
23 need to log something twice. I'm not ruling on this at this
24 point. If, for example, your firm, whether your current or
25 prior, were running this investigation -- it is not even clear

1 what the investigation is, but I know we have had discussion
2 about it -- and you were running it in such a way that it
3 didn't touch the in-house folks because they wanted to do it
4 that way, obviously we would have to look at what's in your
5 firm's files.

6 I suggest you all, again, cooperate with each other
7 more than you are already doing. Otherwise, whoever the
8 special master is will deal with this in the first instance and
9 I'll deal with the question of whether there has been a
10 privilege waiver or not.

11 MR. LYTTLE: Your Honor, their investigation was by
12 investigative firms hired that went out to talk with sources
13 and generated the reports. The law firms did not run that.
14 They were independent people. We, your Honor, are not planning
15 to search Quinn Emanuel or Weil Gotshal files.

16 THE COURT: Understood.

17 MR. BLACKMAN: We don't know what the documents say,
18 so we obviously are kind of in the dark on this.

19 THE COURT: Were there reports in those outside
20 investigative firms?

21 MR. LYTTLE: Yes, your Honor.

22 THE COURT: Are those going to be produced?

23 MR. LYTTLE: They are, your Honor. Some will be
24 logged, some will be produced.

25 THE COURT: Any reason that can't be expedited?

MR. LYTTLE: We can expedite that, your Honor. The hesitation I have is that there is case law and we are coming to your Honor for a protective order. These are confidential sources that face reprisal, economic, business reprisal, and potentially personal harm.

I don't want to be a drama queen or create too much drama about this, but this is a very serious matter in Africa. Our confidential sources, pursuant to case law, we are going to redact those. They can have the facts and what was relayed, but the identity of those sources is something that we cannot disclose.

THE COURT: We will deal with that when I or the special master needs to deal with it. I think the main issue is, because of the statute of limitations argument, to get them the information they need so they can make the argument about you knew about this at a point where you should have brought the suit earlier than you did, etc.

Let's expedite the production of those reports. Presumably, your client knows where to find those very quickly. All documents about may be different. But the reports, however many it is, redact, produce.

I'm not saying it is appropriate to redact. I'm saying you will do it that way because that is what you want to do. They will argue to me it is inappropriate or it is appropriate. We will go from there. If there are reports

1 similar that you are saying are totally privileged, log those
2 immediately and see if we can make some progress.

3 MR. BLACKMAN: The last thing, your Honor, is the
4 other third parties besides Chinalco. We have had discussion
5 with them, and they have been very reluctant. We know they
6 talked to Chinalco, the Chinese mining company, and they may
7 well have provided that entity with the same allegedly
8 confidential material. We also believe they talked to other
9 third parties and they have just been reluctant to do that.

10 We think it is totally fair game for discovery in
11 light of their issues about misappropriation and also as part
12 of the fact that whereas they claim we tricked them into
13 talking to us, the truth of the matter is we think they tricked
14 us into talking to them while they were talking to a whole
15 bunch of other people.

16 THE COURT: We will worry about that at the next
17 conference. We have run out of time. The usual drill. You
18 will all have to purchase the transcript. You will get me by
19 tomorrow the proposed scheduling order as a clean document so I
20 can get that entered.

21 MR. LYTTLE: Yes, your Honor.

22 THE COURT: See you February 6th.

23 (Adjourned)
24
25